

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT SMITH,

Civil Action

Plaintiff,

No. 07-1464

v.

Judge McVerry

SPECIALTY POOL CONTRACTORS,

Defendant.

JURY TRIAL DEMANDED

**PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE PREVIOUSLY UNDISCLOSED  
WITNESSES**

Plaintiff Robert Smith, by undersigned counsel, and pursuant Fed.R.Civ. P. 26 (a) and 37(a)(1), and this Court's pretrial order of November 25, 2008, [Doc. No. 32] moves *in limine* to preclude Defendant from calling certain witnesses because it failed to disclose the identity of those witnesses either in its required Disclosures under Fed.R.Civ.P. 26(a) or in discovery and in support states the following:

1. This is an action under Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2.

2. Plaintiff Robert Smith alleges he was subjected to discriminatory terms and conditions of employment because of his race and religion by his employer, Defendant Speciality Pool Contractors, when his supervisors repeatedly told him he was a Jew; reminded him that they did not like Jews, and then repeatedly referred to Smith as a Jew, Hebrew, Abraham and Kike.

3. Many times, Smith's supervisor would refer to the Holocaust, and tell Smith: "Hitler did not do a good enough job because you (Smith) are still alive." At work, Smith's supervisors would taunt Smith by saying "Heil Hitler" and raising their hands in a Nazi salute.

4. In its pretrial statement, Defendant has listed Joshua Brown, Alice Doubt, James

Goldman, Gary Gottshalk Betty Kleespies Dawn Norris Jacob Norris James O'Donnell, Allan Rose and Ron Rumpf, and Donald White, as witnesses for damages and liability. (Def's Pretrial Statement at 7-9)[Doc. No. 31].

5. Defendant did not disclose *any* of these witnesses in its Required Disclosures pursuant to Fed.R.Civ. P. 26(a)(1); in any supplement to its Required Disclosures; or in response to any discovery request. *See* (Response to Plaintiff's First Interrogatories No. 2, App. Ex. 1).

6. Smith moves to exclude: Joshua Brown, Alice Doubt, James Goldman, Gary Gottshalk Betty Kleespies Dawn Norris Jacob Norris James O'Donnell, Allan Rose and Ron Rumpf, and Donald White from testifying at trial because Defendant never disclosed either the existence of those witnesses nor the nature of their testimony, as required by Rule 26.

7. Fed.R.Civ.P. 37(c)(1) provides in relevant part:

If a party fails to identify a witness as required by Fed.R.Civ.P. 26(a) or (e), the party is not allowed to use that witness at trial, unless the failure was substantially justified, or is harmless.

8. By its terms, Rule 26(a) required Defendant to disclose Joshua Brown, Alice Doubt, James Goldman, Gary Gottshalk Betty Kleespies, Dawn Norris, Jacob Norris, James O'Donnell, Allan Rose, Ron Rumpf, and Donald White at the outset of this litigation, or, at a minimum, to supplement during the discovery period. Defendant did neither.

9. Thus, pursuant to Rule 37(c), those witnesses should not be permitted to be used at trial, absent Defendant showing its failure to disclose was substantially justified.

10. Defendant will not be able to show substantial justification. All of these witnesses are either related to the principals in this case or work for Defendant, so there is no possibility Defendant did not know of them during discovery.

11. Defendant has not explained who any of these witnesses are or what evidence they

intend to offer.

12. Trial is not a game of hide the ball. The Federal Rules of Civil Procedure require that witnesses be disclosed during a time when disclosure matters—that is when potential witnesses can be deposed, or documents be requested.

13. Indeed, Defendant has previously objected to Plaintiff calling his mother, because she was not listed. The same result should occur for the 11 witnesses Defendant listed in its pretrial, but who were not disclosed in its Rule 26 disclosures.

WHEREFORE, Smith moves to preclude the testimony at trial of Joshua Brown, Alice Doubt, James Goldman, Gary Gottshalk, Betty Kleespies, Dawn Norris, Jacob Norris, James O'Donnell, Allan Rose, Ron Rumpf, and Donald White.

Respectfully submitted,

**OGG, CORDES, MURPHY & IGNELZI**

/S/ Samuel J. Cordes

Samuel J. Cordes

Christine T. Elzer

Pa. I.D. No. 54874 (Cordes)

Pa. I.D. No. 208157 (Elzer)

245 Fort Pitt Boulevard

Pittsburgh, PA 15222

(412) 471-8500

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify on this 9<sup>th</sup> day of March, 2009 I served a copy of ***Plaintiff's Motion in Limine to Exclude Undisclosed Witnesses*** via electronic mail upon the following:

Kurt Miller  
Amy Berecek  
Thorp Reed & Armstrong  
One Oxford Centre  
301 Grant Street, 14<sup>th</sup> Floor  
Pittsburgh, PA 15219

/S/ Samuel J. Cordes  
Samuel J. Cordes